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IN THE

Supreme Court of the United States

October Term, 1952

No. 517

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,

Petitioners,

against

LEOLA JACKSON,

Respondent.

BRIEF ON BEHALF OF AMERICAN JEWISH COMMITTEE AND ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH *AMICI CURIAE*

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Interest of the *Amici*

This brief is filed with the consent of both parties, on behalf of the American Jewish Committee and the Anti-Defamation League of B'nai B'rith, as *amici curiae*.

The American Jewish Committee is a corporation created by an Act of the Legislature of the State of New York in 1906. Its charter states:

> The object of this corporation shall be to prevent the infraction of the civil and religious rights of Jews, in any part of the world; to render all lawful assistance and to take appropriate remedial action in the

event of threatened or actual invasion or restriction of such rights, or of unfavorable discrimination with respect thereto . . .

During the forty-seven years of its existence it has been one of the fundamental tenets of the organization that the welfare and security of Jews in America depend upon the preservation of constitutional guarantees. An invasion of the civil rights of any group is a threat to the safety of all groups.

For this reason the American Jewish Committee has on many occasions fought in defense of civil rights even though Jewish interests did not appear to be specifically involved.

B'nai B'rith, founded in 1843, is the oldest civic organization of American Jews. It represents a membership of over 350,000 men and women and their families. The Anti-Defamation League was organized in 1913, as a section of the parent organization, in order to cope with racial and religious prejudice in the United States. The program developed by the League is designed to achieve the following objectives: to eliminate and counteract defamation and discrimination against the various racial, religious and ethnic groups which comprise our American people; to counteract un-American and anti-democratic activity; to advance goodwill and mutual understanding among American groups; and to encourage and translate into greater effectiveness the ideals of American democracy.

Each of these organizations has among its fundamental tenets the preservation of the rights guaranteed every citizen by our Federal Constitution.

Organizations such as these, dedicated to the defense of American democracy, cannot stand by silently while our cities and towns are threatened with a flood of restrictive covenants banning occupancy by members of specific racial or religious groups. Therefore, the American Jewish Committee and the Anti-Defamation League of B'nai B'rith joined other civil rights organizations in filing a brief *amici curiae* in this Court in the Restrictive Covenant Cases in 1948.

The dangers to our democratic way of life arising from racial residential segregation are obvious. In 1890 San Francisco sought to achieve racial zoning by adopting an ordinance barring Chinese from living in certain areas of the city. This was followed by the enactment of similar ordinances directed against Negroes in several southern and border cities. In 1917, however, a holding by this court that such ordinances were unconstitutional placed an insurmountable obstacle in the way of efforts to achieve racial residential segregation by legislation. *Buchanan* v. *Warley*, 245 U. S. 60. Thereafter, those seeking to extend the pattern of racial segregation found a new and better means of achieving their goal. They seized upon the ancient and well established device of the private restrictive covenant barring from a neighborhood uses detrimental to the health or comfort of those residing in it, such as glue or soap factories, livery stables, charnel houses, and brothels. They adapted the private restrictive covenant to their needs, revising it to bar—instead of specified uses—occupancy by those racial, religious, or ethnic groups which they consider undesirable. The use of this new technique spread with ominous rapidity, primarily because many state courts upheld and enforced

the new covenants; nearly always the courts failed to distinguish between a covenant barring an obnoxious use and a covenant barring residential occupancy by members of specific racial or religious groups. In 1948 this Court struck down the use of the machinery of state courts to enforce these anti-democratic covenants. Now a new twist has been added. It is claimed that *Shelley* v. *Kraemer* and *Hurd* v. *Hodge* (334 U. S. 1, 24) do not ban actions for damages for breach of racial restrictive covenants.

If racial restrictive covenants can be enforced, either through suits in equity or in law, they can again become instruments of bigotry giving aid and comfort to racial and religious prejudice. Implicit in such a covenant is the anti-democratic and false racist doctrine that undesirable social traits are an attribute not of the individual but of a racial or religious group. Such covenants classify an individual not on the basis of his behavior, but on the basis of his racial origin. They would deny the free choice of a home to a Carver, Cardozo, or Lin Yutang merely because of color or religion. They ascribe social objectionability to unborn generations.

Slums and overcrowding are the inescapable concomitants of restrictive covenants and racial segregation. Death, disease and crime are the notorious spawn of overcrowding. Inter-group stresses and tensions which threaten our democratic state arise inevitably when racial or religious groups find themselves isolated within the community and forced to live in circumscribed segregated areas. Clearly, the growing fusion of interest of America's varied racial, religious, and ethnic groups, the free interchange of varying cultural viewpoints, the develop-

ment of mutual tolerance and confidence among our citizens—requisites for the strengthening and fulfillment of our democracy—are dangerously impeded by restrictive covenants. It is not surprising that the President's Committee On Civil Rights found that "segregation is an obstacle to establishing harmonious relationships among groups" and recommended vigorous action to outlaw restrictive covenants.

Although Negroes have suffered most from the widespread use of restrictive covenants, many other groups including Mexicans, Spanish Americans, Orientals, Armenians, Hindus, Syrians, Turks, Jews, and Catholics have found such covenants barring them from many residential areas in many cities.

The impact of the racial restrictive covenant does not end at the water's edge. In many lands the prestige of American democracy suffers because our practice in the field of race relations does not always square with our ideals. The refusal of judicial support for any kind of enforcement of racial restrictive covenants will remove a powerful propaganda weapon from the hands of democracy's opponents.

The organizations sponsoring this brief are peculiarly alert to the dangers to democracy arising from racial or religious residential segregation. Jewish experience under European despotism gave rise to the word "ghetto". The threat of revival of that institution—implicit in the newest attempt to make racial restrictive covenants a deterrent to free use and occupancy of real property—demands our intercession in this case.

Statement of the Case

The three petitioners are home owners in a Los Angeles residential area. Two of them and the respondent were among the signers of a racial restrictive agreement on October 21, 1944. The third petitioner, although not a signatory of that agreement, is a successor in interest of a signer. The agreement was duly recorded on May 8, 1945.

On February 2, 1950, the respondent sold her home but did not include the proscriptive racial covenant in her deed. Subsequently, Negroes occupied the respondent's former residence and petitioners commenced this action against respondent for damages alleged to have resulted from her failure to incorporate the racial restrictive covenant in her deed of February 2, 1950.

On February 23, 1951, the respondent filed a demurrer to the petitioners' second amended complaint (R. 7-8). On March 26, 1951, Judge Daniel N. Stevens filed a memorandum opinion in the Superior Court of Los Angeles County sustaining the demurrer and dismissing the complaint "without leave to amend" (R. 8-16). Judgment in accordance with that opinion was entered on March 29, 1951 (R. 16).

On August 6, 1952, the District Court of Appeal, Second Appellate District, affirmed the decision of the Superior Court. 112 Cal. App. 2d 534, 247 P. 2d 99 (R. 30-56). A petition for rehearing was filed with the District Court of Appeal on August 20, 1952 and denied on September 4, 1952.

A petition for hearing before the Supreme Court of California was denied on October 2, 1952, and this Court granted certiorari on March 9, 1953.

The Issue Presented

The sole issue presented by this case is whether this Court in *Shelley* v. *Kraemer*, 334 U. S. 1, held that any and all forms of court enforcement of racial restrictive covenants are state action which violates the equal protection of the laws clause of the Fourteenth Amendment or whether this Court intended, in that case, to limit its holding so that only suits in equity for specific performance would be deemed such state action.

Summary of Argument

Shelley v. *Kraemer*, 334 U. S. 1, and the companion cases were intended by this Court to bar any form of judicial proceeding to enforce or compel compliance with racial restrictive covenants. Most lower courts that have been presented with this issue have so interpreted *Shelley* v. *Kraemer*. Whether compliance is sought through an equity suit for injunction against sale to a member of the excluded class or through a law suit for damages for breach of a racial restrictive covenant, it is the judicial machinery and procedures of the state that are invoked and this is "state action" prohibited by the equal protection of the laws clause of the Fourteenth Amendment.

Any narrow interpretation of this Court's decision in the Restrictive Covenant Cases, which would countenance suits for damages, would revive the effectiveness of racial covenants as a tool to perpetrate ghettos, black belts and restricted residential neighborhoods where Americans would be excluded, through the assistance of the courts, on the grounds of race, color, religion or nationality. This would result in a denial of rights protected by the Fourteenth Amendment.

POINT I

A state court may not entertain a suit for damages for breach of a racial restrictive covenant because the court would thereby deny equal protection of the laws in violation of the Fourteenth Amendment.

The relevant portion of the Fourteenth Amendment reads as follows:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

This Court has consistently held that the equal protection clause proscribes any and all forms of state action which discriminates on the basis of race or color. *Shelley* v. *Kraemer*, 334 U. S. 1, 14.

The question of the applicability of the Fourteenth Amendment to court action enforcing racial restrictive covenants first came before this Court in 1948 in a series of cases commonly known as the Restrictive Covenant Cases. *Shelley* v. *Kraemer* and *McGhee* v. *Sipes*, *supra*; *Hurd* v. *Hodge* and *Urciolo* v. *Hodge*, 334 U. S. 24. In those cases, this Court held that the equal protection clause of the Fourteenth Amendment barred judicial enforcement of racial restrictive covenants.

> The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes *action of state courts and state judicial officials*. Although, in construing the terms of the Fourteenth Amendment, differences from time to time have been expressed as to whether particular types of action may be said to offend the Amendment's

> prohibitory provisions, it has never been suggested that *state court action* is immunized from the operation of those provisions simply because the act is that of the *judicial branch of the state government.* (18) (Emphasis added.)

The Restrictive Covenant Cases dealt with petitions seeking injunctive relief for specific performance of racial restrictive covenants. Action by the state courts was involved in the *Shelley* case while action by the Federal District Court for the District of Columbia was at issue in the *Hurd* case. In reversing the lower courts and outlawing the use of "judicial action" to enforce these racial restrictive covenants, this Court said:

> We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. *Shelley* case, *supra* (20).

Aftermath of the Restrictive Covenant Cases

One week after this Court established the second rule of *Shelley's* case, it applied it in reversing decisions of the Supreme Courts of Ohio and California which had held racial restrictive covenants enforceable. *Trustees of Monroe Avenue Church of Christ* v. *Perkins,* 334 U. S. 813; *Amer* v. *Superior Court of State of California,* and *Yin Kim* v. *Superior Court of the State of California,* 334 U. S. 813.

Several restrictive covenant cases were pending in various state courts at the time of the *Shelley* decision. On July 16, 1948, some two months after this Court's ruling, the New York State Court of Appeals, by memorandum opinion which simply referred to the *Shelley* de-

cision, reversed a lower court which had granted an injunction against violation of a restrictive covenant. *Kemp* v. *Rubin,* 298 N. Y. 590. In November of the same year, the Supreme Court of Illinois rendered a similar decision in the case of *Tovey* v. *Levy,* 401 Ill. 393.

In December 1948, the Court of Appeals of Maryland had before it two cases involving petitions for specific enforcement of racial restrictive covenants. *Goetz* v. *Smith,* and *Saunders* v. *Phillips,* 191 Md. 707, cert. denied 336 U. S. 967. The plaintiffs argued that the *Shelley* decision did not apply to them because, despite the covenants, Negroes had occupied at least several of the parcels in question for periods of over twenty years. They also pointed out that in the *Shelley* case, the Negro purchaser had had no actual knowledge of the restrictions at the time he made his purchase, while in the cases before the Maryland court, the Negro defendants knew of the restrictions at the time they bought the property.

The Court of Appeals of Maryland rejected all these contentions and relied on *Shelley* v. *Kraemer, supra,* as conclusive authority for the proposition that it was barred from granting the requested injunctions.

In the same month, a Texas appellate court in the case of *Clifton* v. *Puente,* 218 S. W. 2d 272, followed a similar course of action. The covenant there involved barred sale or lease to "persons of Mexican descent" and provided that the land should revert to the original owner in case of violation. In December 1947, the property had been sold to Puente, a person of Mexican descent. Thereupon the original owner, claiming a reversion under the terms of the covenant, sold the same piece of land to the plaintiff, Clifton, who joined with the original owner in

bringing an action against Puente for a declaration that Clifton was the rightful owner of the land. Puente countered by asking the court for an order granting him possession of the property. While the matter was under consideration in the trial court, the *Shelley* decision was rendered. Despite this decision, the plaintiffs pressed their demand that the court cancel the deed by which the property had been conveyed to Puente.

The trial court, on the basis of the *Shelley* decision, dismissed the plaintiffs' action and granted Puente's counterclaim. The Texas Court of Civil Appeals affirmed the decision of the trial court. It rejected the claim of the plaintiff that there was a distinction between cases where the plaintiffs were seeking to enforce a racial restrictive covenant by means of an injunction and the case before the Texas court in which the plaintiff was seeking merely to have the court declare that the covenant was valid and by its provisions entitled him to possession upon breach. In rejecting this contention, the Texas Court of Civil Appeals said:

> It is as much an enforcement of the covenant to deny a person his legal right to which he would be entitled except for the covenant as it would be to expressly command the judicial order that the terms of the covenant be recognized and carried out. No valid distinction can be predicated on the position of a party (alleged to be an ineligible grantee) as a plaintiff or as a defendant. Under the decision of the Supreme Court above referred to [*Shelley* v. *Kraemer*], judicial recognition or enforcement of the restrictive covenant involved here is precluded by the "equal protection of the law" clause of the Fourteenth Amendment. *Clifton* v. *Puente, supra.*

When persons interested in retaining the effectiveness of restrictive covenants to maintain the racial character of residential neighborhoods, found that state courts refused to issue injunctions to enforce them, they searched for other legal technicalities. One of the first such devices was a suit for damages for violation of the restrictive covenant. The case of *Weiss* v. *Leaon* which arose in Kansas City, Mo., and was decided by the highest court of the State of Missouri on December 12, 1949, originated as a suit for both an injunction and damages brought by a group of white signers of a restrictive covenant against other white signers, who were planning to sell to Negroes. The plaintiffs, seeking enforcement of the covenant, made the prospective Negro buyers co-defendants. The trial court rejected the request for an injunction on the basis of *Shelley* v. *Kraemer*. It also rejected the plaintiffs' request for damages. The Supreme Court of Missouri, on appeal, ruled that the trial court's refusal to enforce the covenant by injunction was proper, but that a suit for monetary damages brought against the white sellers for breach of a restrictive covenant was not barred by this Court's ruling in the *Shelley* case. The Supreme Court of Missouri sent the case back to the trial court for a determination of the damages, if any, suffered by the plaintiffs. *Weiss* v. *Leaon*, 359 Mo. 1054. The plaintiffs, apparently satisfied that the Missouri Supreme Court's ruling (that a damage suit could be brought) would have the deterrent effect sought, have not returned to the trial court for an assessment of damages.

A somewhat different device to evade the impact of *Shelley* v. *Kraemer* was used in Oklahoma. An owner of land subject to a restrictive covenant against Negroes, sold the land to a white person who in turn sold it to

Negroes. White owners of other lots covered by the covenant sued to have the sale set aside. They alleged a conspiracy to damage them by destroying the restrictions, charging as co-conspirators the original white sellers, the white intermediary seller and the Negro purchasers. Plaintiffs' claim for damages was thus based on *conspiracy* which under state law constitutes a tort giving rise to an action for damages. Plaintiffs claimed as damages the costs they had incurred in connection with the conclusion of the restrictive covenant and the alleged depreciation of their land resulting from the sale to a Negro.

The trial court dismissed the action in its entirety on the authority of *Shelley* v. *Kraemer*. The Oklahoma Supreme Court upheld the trial court's refusal to set aside the sale, but reversed the ruling that there could be no claim for damages based on conspiracy. The court argued that *Shelley* v. *Kraemer* had ruled a racial restrictive covenant a "valid contract" and that, therefore, an agreement entered into by two or more people to bring about a violation of such a contract could constitute the tort of conspiracy giving rise to an action for damages. Hence the Supreme Court of Oklahoma ordered the trial court to uphold that portion of the complaint claiming damages for conspiracy. *Correll* v. *Earley*, 237 P. 2d. 1017.

Despite the different bases of the damage claims in both cases (breach of contract in Missouri, tort for conspiracy in Oklahoma) the rationale of both decisions is very similar. Both courts ruled that a restrictive covenant was a valid contract—though unenforceable by court action for specific performance—and that therefore the damage resulting from its breach was recoverable.

On the other hand, the United States District Court in the District of Columbia held, on October 5, 1950, that *Shelley* v. *Kraemer* and *Hurd* v. *Hodge* barred an action for damages for breach of a racial restrictive covenant, even though the covenant itself, as in this case, specified that damages were assessable in the event of breach. *Roberts* v. *Curtis*, 93 F. Supp. 604. In dismissing the action, Judge Holtzoff stated that he construed "the holdings of the Supreme Court [in *Shelley* v. *Kraemer* and *Hurd* v. *Hodge*] as withholding any judicial assistance for enforcement of such restrictive covenants."

On January 30, 1951, the Circuit Court of Wayne County, Michigan, granted a motion to dismiss a suit brought to collect $5,000 damages for breach of a racial restrictive covenant. The plaintiffs and defendants in this case were owners of adjoining lots subject to the covenant. The defendants had sold their property to Negroes in disregard of the covenant.

In dismissing the complaint, Circuit Judge Frank B. Ferguson relied on the *Shelley* decision and ruled that, under it, racial restrictive covenants could not be enforced by state courts. The court also cited a number of Michigan cases holding that, where two persons enter into a contract based upon certain assumptions as to their legal rights, and are mistaken in those assumptions, the contract is void and will be set aside upon application to the courts. Pointing out that the racial restrictive covenant involved in this action was a contract based on the assumption that an injunction could be obtained against its violation, the court held that the covenant upon which the suit was based was unenforceable and that the suit must, therefore, be dismissed.

The judgment of the Circuit Court was affirmed by the Supreme Court of Michigan on the authority of *Shelley* v. *Kraemer*. The court said:

> If the sale of property subject to a reciprocal restrictive covenant cannot be made without rendering the grantor liable to suits for damages, such fact, it may be assumed, would operate to inhibit freedom of purchase by those against whom the discrimination is directed and also to place a burden on the right of an owner to sell to a purchaser of his own selection. *Phillips* v. *Naff*, 332 Mich. 389.

In an interesting case, an effort at intimidation of a white seller came to the attention of the Circuit Court of Wayne County, Michigan. That court quickly granted an injunction to the plaintiff who had sold property to Negroes in defiance of a racial restrictive covenant. The injunction was directed against a group of persons who had picketed the plaintiff's home and office denouncing him for selling "white" property to Negroes. In granting the injunction the court ruled that the picketing was unlawful interference with the rights of the plaintiff to dispose of his property to any purchaser. *Brock* v. *Murphy*, January 11, 1951, opinion by Circuit Judge Chester P. O'Hara.

The Issue Reaches This Court.

Now, five years after this Court's historic decision in the Restrictive Covenant Cases, it has before it a case involving the constitutionality of an action in a state court for damages for breach of a racial restrictive covenant. This case arises on a demurrer to the complaint. The material facts alleged in the complaint, and taken as true for purpose of this appeal, are as follows: On October 21,

1944, two of the three petitioners, a grantor of the third petitioner and the respondent, the then owners of four parcels of realty in Los Angeles, entered into a written agreement in which all the parties bound themselves and their successors by a continuing covenant that no part of their realty was to "be used or occupied by any person or persons not wholly of the white or Caucasian race." It was further agreed that this racial restriction should be included in "all papers and transfers" of the properties in question. The agreement was duly recorded on May 8, 1945. On February 2, 1950, the respondent here executed and recorded a deed by which she conveyed one of the lots covered by the agreement but she omitted from that deed the restrictions contained in the agreement of October 21, 1944. Several months later, the respondent moved out of the house on the property conveyed and thereafter it was occupied by Negroes. The complaint alleges that the respondent moved out of the house she conveyed "in order to permit persons known to her to be other than [of] the Caucasian race to move into and occupy said house, and with the intention that persons not of the Caucasian race should move into and occupy said house." (R. 4) The petitioners' claim for damages is predicated upon (1) respondent's failure to incorporate the racial restrictive covenant in her deed, and (2) the non-conforming occupancy after respondent had signed the 1944 agreement.

We have here a respondent who was herself a subscriber to the restrictive agreement in question and who knowingly violated her obligations under that agreement. No claim can be made in this case that the agreement was imposed upon the respondent by others. This is not an action for damages against a Negro. In a sense, therefore,

it can be argued that this case involves a moral obligation voluntarily assumed by the respondent and wilfully disregarded by her with knowledge of the possible consequences of her conduct.

It is respectfully submitted that none of these facts are material. The decisions of this Court in the Restrictive Covenant Cases are sound and controlling. Here, as there, petitioners seek to invoke the aid of the judicial branch of the state government to enforce a racial restrictive covenant. Here, as there, a decision in the petitioners' favor would limit the freedom to acquire and occupy real property of non-Caucasians, Negroes, Japanese Americans, Chinese Americans, American Indians, possibly Mexican Americans, and any other racial, religious or nationality group which some timid grantor might believe, or be advised by a cautious lawyer, would subject him to a suit for damages under similar agreements. Here, as there, a decision in favor of petitioners would limit the right of a grantor to dispose of his property without regard to the race, religion or nationality of the grantee.

Damage Suits Are Means for Enforcing Contracts.

It is elementary that a damage suit is one of several ways in which a court may enforce compliance with a binding contract. In fact it is the usual, and frequently the sole, remedy for breach. The object of the assessment of damages is to put the injured plaintiff in as good a position as he would have had if the contract had been fully performed. Damages are merely "the judicial method of satisfying the contract." *Campbell Building Co.* v. *State Road Commission*, 95 Utah 242, 70 P. 2d. 857, 862; *Horn* v. *Matagorda County (Texas)*, 213 S. W. 934, 935. Clearly, therefore, actions for damages are the judicial

procedures designed to secure for a party injured by breach of contract, precisely what he bargained for or a money equivalent so that he would "be placed in the same situation . . . as if the contract had been performed." *Robinson* v. *Harmon*, 1 Ex. 850, 154 Eng. Rep. 363. Specific performance, on the other hand, is the exceptional remedy, available only where damages for breach of contract are an inadequate remedy.

The instant action, to enforce the original covenant by a damage suit, like an action for specific performance, is intended to maintain the pattern of racial exclusion which was the purpose of the agreement sued on. In other words, the damage suit here is predicated upon the power and sanction of the state courts to compel compliance with the restrictive agreement entered into by the parties in 1944.

If an action for damages is maintainable, property owners obviously will refrain from selling to members of the excluded class. A threat of legal liability in damages can have but one effect—to compel all parties owning land subject to the covenant to obey its terms. As Mr. Justice Holmes said in his dissent in *Bailey* v. *Alabama*, 219 U. S. 219:

> Any legal liability for breach of a contract is a disagreeable consequence which tends to make the contractor do as he said he would. Liability to an action for damages has that tendency as well as a fine. (246)

Judicial enforcement by assessment of damages entails much of the standard machinery of the courts. A naked judgment for damages does not end the involvement of the state acting through its judiciary. Further coercive action may be, and normally is, invoked. A money judgment is docketed by the Clerk of the Court, thereby becoming a lien on real property. Execution is issued, involving ac-

tion by the marshal or sheriff. If execution is returned unsatisfied, other proceedings supplementary to judgment are available through the court. Examination of the judgment debtor to disclose assets is a standard supplementary proceeding supervised by the court. The court's power to punish for contempt is available to the judgment creditor in such proceedings. If property of the judgment debtor is found, the state, through its sheriff or marshal, may levy on it. Execution against property, and in some cases against the person, of the judgment debtor, is available. Many state civil practice acts also provide for warrants of attachment and garnishment of salaries or income. Clearly, then, it is no less an exercise of state power when property is seized and sold by a sheriff or marshal to satisfy a judgment for damages, or when any of the other supplementary proceedings are resorted to, than when the power of a court of equity is invoked to compel specific performance of the terms of an agreement. Whether a racial restrictive covenant is enforced by a suit in equity or in law, "the full panoply of state power" is available to the victor to enforce the agreement.

> The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. [*Bridges* v. *California*, 314 U. S. 252] Nor is the Amendment ineffective simply because the particular pattern of discrimination which the state has enforced, was defined initially by the terms of a private agreement. *State action*, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to *exertions of state power in all forms*. *Shelley* v. *Kraemer*, 334 U. S. 1, 20. (Emphasis added.)

In *Buchanan* v. *Warley*, 245 U. S. 60, and *Harmon* v. *Tyler*, 273 U. S. 668, this Court upheld "the right of white sellers to dispose of their properties free from restrictions as to potential purchasers based on consideration of race or color". *Shelley* case, *supra*, 12. If this Court should now hold the respondent liable in damages for permitting occupancy of the covenanted property, it would impair her right to sell her property free from such improper restrictions. It would be permitting the use of state machinery to enforce a "duty" not to sell to colored purchasers or permit use by non-Caucasians, and to the respondent, and others similarly situated, it would be immaterial whether that "duty" is enforced by the threat of injunction or liability to pay money damages.

In this connection, it is noteworthy that throughout the unanimous opinion in *Shelley* v. *Kraemer*, *supra*, this Court never once used the phrase "specific performance" or "injunctive relief". It spoke in terms of "judicial action", "action of state courts," "judicial enforcement" and "court enforcement." Only those lower courts, which have sought to narrow the impact of this Court's holding and to find ways of evading it, have made use of the fact that the Restrictive Covenant Cases involved suits for specific performance. This Court, on the other hand, went to the nub of the matter and dealt with it as a problem of state action to force compliance with racial restrictive agreements.

Social Consequences of Enforcing Racial Restrictive Covenants

The new rule of *Shelley's* case is as important in the development and growth of our democratic theory as the old rule of *Shelley's* case was in the development of the

Anglo-Saxon law of real property. In *Shelley v. Kraemer*, this Court denied to the forces of bigotry, discrimination and "exclusiveness" a weapon which they were using successfully to create the racial and religious slums and ghettos typified by our Harlems and our West Coast "Chinatowns" which are duplicated in many, many cities of the country. An informal survey conducted by James N. Rhea and reported in a series of feature articles entitled "Bulge In The Color Line" in the Providence, R. I., *Journal Bulletin* commencing March 24, 1953, and continuing to the present (the thirteenth article in the series appeared April 6, 1953), reveals that as a result of the decision of this Court in the Restrictive Covenant Cases, thousands of Negroes have been able to purchase and occupy homes in neighborhoods previously barred to them by restrictive covenants. While Negroes have not yet achieved complete equality in the opportunity to acquire and occupy private homes (Milwaukee *Journal*, December 19, 1951), the process of integration of racial and religious groups in housing has taken a definite spurt forward in the last five years. *See*: Bibliography in "Open Occupancy In Public Housing", Public Housing Administration, Housing & Home Finance Agency, U. S. Gov. Printing Office, Washington, D. C. (1953), 26-27; Abrams, Charles, "Housing", American Jewish Year Book (1950), 82-88. *See also*: Morris, John D., special report to *The New York Times*, December 19, 1949, describing the reaction of the Federal Housing Administration to the decision of this Court in the Restrictive Covenant Cases.

An inevitable consequence of racial segregation in housing is discrimination in employment, education, places of public accommodation, and health and welfare services. The result is to create and intensify feelings of resentment,

hostility and frustration among the excluded groups. Community friction and conflict follow. Policies of housing segregation lead also to overcrowding which creates slums, juvenile delinquency and other social evils which our American way of life must always seek to reduce and eliminate. The decision of this Court in the Restrictive Covenant Cases made possible an effective onslaught on housing segregation and discrimination. If this Court, by its decision in this case, narrows and undermines the impact of its earlier decision, the progress we are now making will be ended and our country may once again revert to the establishment of more ghettos and black belts.

The President's Committee on Civil Rights, in its famous report, recognized the significance and fundamental role of the enforceable racial restrictive covenant in this context. The Committee recommended:

> The enactment by the states of laws outlawing restrictive covenants;
>
> Renewed court attack, with intervention by the Department of Justice, upon restrictive covenants.
>
> *To Secure These Rights*, U. S. Gov. Printing Office, Washington, 1947, 169.

That recommendation was predicated upon the following analysis:

> The effectiveness of restrictive covenants depends in the last analysis on court orders enforcing the private agreement. The power of the state is thus utilized to bolster discriminatory practices. The Committee believes that every effort must be made to prevent this abuse. We would hold this belief under any circumstances; under present conditions, when severe housing shortages are already causing hardship for many people of the country, we are especially emphatic in recommending measures to alleviate the situation. *Ibid.*

The Committee's suggestions in this respect were put into effect. The battle was won. The counterattack must be defeated.

Conclusion

For all of the reasons urged herein and to aid our Country, which is now engaged in an ideological world conflict in which the practices of our democracy are the subject of close scrutiny by our friends and foes abroad, this Court cannot afford, nor will the world permit us, to rest upon democratic pretensions unrelated to reality. All attempts to enforce racial restrictive covenants, by suits for damages or by any other device conceived by resourceful lawyers seeking to evade the mandate of this Court in *Shelley* v. *Kraemer* and *Lurd* v. *Hodge*, should be rejected.

The decision of the District Court of Appeal of the Second Appellate District of California should therefore be affirmed.

Respectfully submitted,

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